

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jun 15, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RUSSELL JONES and REINA JONES, a
married couple,
Plaintiffs,
v.

NO. 2:19-CV-00264-SAB

GRANT COUNTY HOSPITAL DIST.
NO. 1 d/b/a/ SAMARITAN HOSPITAL, a
Washington Municipality,
Defendant.

**ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Before the Court is Defendant's Motion for Summary Judgment, ECF No. 107. The motion was heard without oral argument.¹ Plaintiffs are represented by Ryan Best and Jacob Mark. Defendant are represented by Amy Mensik and Sawyer Margett.

Introduction

Plaintiffs Russell Jones and Reina Jones are bringing employment discrimination claims against Mr. Jones' former employer, Defendant Samaritan Hospital. Plaintiffs assert that Mr. Jones was terminated because of his sex and age and because he requested accommodations for his hearing loss and filed an EEOC

¹ The Court has determined that oral argument was not necessary.

1 charge and because of his gender and age. Defendant asserts Mr. Jones was
2 terminated for inappropriate conduct.

3 **Motion Standard**

4 Summary judgment is appropriate “if the movant shows that there is no
5 genuine dispute as to any material fact and the movant is entitled to judgment as a
6 matter of law.” Fed. R. Civ. P. 56(a). There is no genuine issue for trial unless
7 there is sufficient evidence favoring the non-moving party for a jury to return a
8 verdict in that party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250
9 (1986). The moving party has the initial burden of showing the absence of a
10 genuine issue of fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).
11 If the moving party meets its initial burden, the non-moving party must go beyond
12 the pleadings and “set forth specific facts showing that there is a genuine issue for
13 trial.” *Anderson*, 477 U.S. at 248.

14 In addition to showing there are no questions of material fact, the moving
15 party must also show it is entitled to judgment as a matter of law. *Smith v. Univ. of*
16 *Wash. Law Sch.*, 233 F.3d 1188, 1193 (9th Cir. 2000). The moving party is entitled
17 to judgment as a matter of law when the non-moving party fails to make a
18 sufficient showing on an essential element of a claim on which the non-moving
19 party has the burden of proof. *Celotex*, 477 U.S. at 323. The non-moving party
20 cannot rely on conclusory allegations alone to create an issue of material fact.
21 *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993).

22 When considering a motion for summary judgment, a court may neither
23 weigh the evidence nor assess credibility; instead, “the evidence of the non-movant
24 is to be believed, and all justifiable inferences are to be drawn in his favor.”
25 *Anderson*, 477 U.S. at 255.

26 **Facts**

27 The record submitted by the parties is voluminous. For the Court’s benefit,
28 the parties prepared Statement of Facts that have assisted the Court in reviewing

1 the record. ECF Nos. 108, 124, 127, 136. Plaintiffs also provided their
2 Declarations, ECF No. 128, 129.

3 Plaintiffs' Declarations contain numerous instances of inadmissible,
4 unsupported, and conclusory facts. Additionally, it appears that these Declarations
5 are an attempt to explain or challenge Defendant's facts, rather than presenting
6 Plaintiffs' version of what happened. As a result, the Declarations are less than
7 helpful for the Court in determining whether there are genuine issues of material
8 fact. For instance, in paragraph 24 of Mr. Jones's Declaration, he stated that
9 "[w]ord came to me that Rebecca Suarez wanted me written up for anything and
10 everything to justify my termination." ECF No. 128. Mr. Jones does not provide
11 the details as to how he came to know this. It appears Mr. Jones wants the Court to
12 take this as "fact." It is unable to do so. Additionally, in paragraph 28, Mr. Jones
13 states that a board member of Samaritan told him that he was not being treated
14 fairly. *Id.* Mr. Jones does not identify the board member, and more importantly,
15 does not provide a declaration from this board member that would provide
16 admissible evidence that this fact was true. Similar problems exist for Ms. Jones's
17 Declaration.

18 Consequently, the Court has taken a critical look at the facts submitted by
19 the parties as presented in the Statement of Facts and will only rely on those facts
20 that would be admissible at trial while reviewing the facts in the light most
21 favorable to Plaintiffs, the non-moving party.

22 The Court also recognizes there are disputed facts surrounding many of the
23 complaints reportedly received by Defendant regarding Plaintiffs' conduct.
24 Additionally, Plaintiffs challenge these reports as inadmissible hearsay. The
25 complaints/reports are not hearsay because they are not being offered for the truth
26 of the matter asserted. Rather, the complaints/reports are being offered and
27 considered by the Court to show that Defendant received the complaints, which is
28 relevant to deciding whether Defendant had a legitimate, nondiscriminatory reason

1 for the actions it took. Notably, Plaintiffs have not disputed that Defendant
2 received the complaints. Rather, they dispute whether the allegations in the
3 complaints were true. The Court recognizes that it is not its role to resolve these
4 questions of fact. However, the Court does need to consider whether Defendant
5 received the complaints and whether it honestly believed these reports to be the
6 basis for its actions. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063
7 (9th Cir. 2002) (noting that courts “only require that an employer honestly believed
8 its reasons for its actions, even if its reason is ‘foolish or trivial or even baseless.’”) Because Plaintiffs have not challenged the fact that the complaints/reports were
9 made or that Defendant received the complaints/ reports they are set forth in the
10 Court’s recitation of the facts. The Court takes no position as to whether the
11 allegations in the complaints/reports are true or false.
12

13 Plaintiff Russell Jones is an Advanced Registered Nurse Practitioner
14 (ARNP) who began working in Defendants’ Emergency Department (ED) in July
15 2017. Prior to that, he worked as an ARNP in Texas. He has been a nurse since
16 1991. Mr. Jones was terminated on April 5, 2019, after Defendant received a
17 complaint from a patient regarding the care he received from Mr. Jones.

18 Mr. Jones has significant hearing loss and wears hearing aids. When he
19 interviewed from the job with Defendant in February 2017, he was assured by
20 Becky DeMers, Defendant’s Chief Nursing Officer, that Defendant would talk to
21 the other nurses about his hearing loss and tell the charge nurses and staff that
22 when he is loud, he is not being mean; rather, it was part of his disability. He was
23 also told that Defendant would hire his wife, Plaintiff Reina Jones, as an ED nurse.
24 After the interview, Defendant offered the job to Mr. Jones. He was 57 years old at
25 the time of the interview. Ms. Jones was hired in October 2017.

26 Mr. Jones was happy working for Defendant for the first eight months.
27 However, Defendant began receiving reports from the nursing staff that Mr. Jones
28

1 resisted seeing Flex Care patients.² Plaintiffs dispute that Mr. Jones resisted seeing
2 Flex Care patients but do not dispute that Defendant received such reports.
3 Plaintiffs believe the reports stemmed from Rebecca Suarez’s frustration that she
4 had to hire Ms. Jones. Defendant held a staff meeting sometime prior to March 9,
5 2018 to discuss process improvement for Flex Care. At the meeting, Mr. Jones
6 became angry and defensive, stating “You will not dictate who I see first” while
7 slamming his hand on the conference room table.

8 On March 9, 2018, Ms. Suarez emailed Ms. DeMers detailing complaints
9 that she had received about Mr. Jones’ behavior in the ED. On March 13, 2018,
10 Mr. Jones met with Ms. DeMers and explained that he and his wife Reina recently
11 had a fight, and he had been arrested for domestic violence-related reasons.

12 On March 14, 2018, Ms. Suarez received a report from Ms. Gloria Robbins,
13 the charge RN, that Mr. Jones yelled at another nurse, Cortney Koehn, and
14 otherwise acted unprofessionally by sarcastically “apologizing” and “bowing.” Mr.
15

16 ² In 2017, Defendant started a “fast track” or “Flex Care” area in its ED. This is an
17 area and process in the ED that addresses patients with lower acuity (*i.e.*, less
18 critical) needs. The purpose of Flex Care is to provide a process to assess, examine
19 and treat patients with less-critical care needs safely and efficiently, so that the
20 main ED room resources, including limited rooms and medical providers, are
21 conserved for more critical patients. In the Flex Care area, for example, patients
22 can be roomed and assessed then returned to the general lobby waiting area while
23 they await x-ray, lab results, etc. In the meantime, another Flex Care patient can be
24 seen and assessed in the open room. At Defendant’s hospital, the Flex Care area is
25 outside the main ED area and across the hall next to the ED waiting area/lobby.
26 The “Admitting” area is where ED patients are initially admitted and is the “hub”
27 of the Flex Care area, including where the provider and nurses interact to discuss
28 care for Flex Care patients.

1 Jones maintains that he had not intended to act unprofessionally, but he admits he
2 was frustrated with the situation and he may have been a bit melodramatic. He
3 maintains he intended to make light of the situation. Ms. Suarez contacted Ms.
4 DeMers to let her know what Ms. Robbins reported about the incident. Mr. Jones
5 also texted Ms. DeMers, letting her know he had to raise his voice to get the
6 nurse's attention because the nurse was deeply involved in her conversation, but he
7 did so very politely.

8 Julie Weisenburg, Chief Human Resources Officer for Defendant, was
9 informed of this incident, and she concluded, based on the various accounts, that
10 Mr. Jones acted inappropriately.

11 On March 15, 2018, Defendant's care representative, Sherrie Jingling,
12 received a call from a caregiver of a minor teenage female patient who had visited
13 Defendant's ED the day before for a possible concussion. The patient was seen by
14 Mr. Jones. The caregiver told Ms. Jingling that she was present in the visit and was
15 concerned about Mr. Jones's attitude with the patient. She stated Mr. Jones told the
16 patient that she was "B-squared," meaning "Beauty and Brains" and that his
17 statements made the caregiver uncomfortable. The caregiver also relayed that Mr.
18 Jones talked about his "drug seeker" son; did not listen when the patient stated her
19 shoulder hurt; and told them that their x-rays were done sometime ago, but because
20 "there were sick and dying people" in the main ED he "didn't have time" to get
21 back to them for follow up. She stated that Mr. Jones "made them feel stupid for
22 coming to the ER." A report of this incident was given to Ms. DeMers and Ms.
23 Weisenburg.

24 On March 20, 2018, Kathryn Trumbull, Defendant's Patient Experience
25 Director, reported an incident to Ms. DeMers that Plaintiffs were "patting each
26 other's bottoms while at the nurses' station" while a "code" was going on in the
27 Trauma room. She indicated that this conduct was in full view of a family in the
28 ED and that other staff were running around trying to handle the code.

1 On March 21, 2018, Joe Byrd, Defendant's head of security, spoke with Ms.
2 Suarez and told her that an anonymous ED staff member approached him about
3 Mr. Jones' "potentially aggressive" behavior toward staff in the ED, particularly as
4 to his wife, Reina, including an incident where Plaintiffs had a loud
5 "uncomfortable" discussion over Ms. Jones giving a patient a medication Mr.
6 Jones had cancelled.

7 Ms. DeMers and Mr. Jones met on April 6, 2018 to discuss the complaints.
8 During the meeting, Plaintiff complained about personal cell phone use amongst
9 the nursing staff. Ms. DeMers agreed to follow up with Ms. Suarez about staff cell
10 phone use.

11 On April 10, 2018, a "Caught in the Act of Caring Card" had been placed on
12 Ms. Suarez's desk in the ED.³ The card was changed to "Caught in the Act of
13 Being Rude" and included a complaint about Mr. Jones from a spouse of a patient,
14 stating Mr. Jones had suggested that she had been the source of her husband's
15 urinary tract infection by not following proper hand-washing procedures. The card
16 also stated, "[t]hen Mr. Jones coughed into his hands and touched my husband."
17 Ms. Suarez forwarded this complaint to Ms. DeMers.

18 On May 5, 2018, Ms. Trumbell received a message from a male patient who
19 had been seen in the ED the day prior. The patient reported that Mr. Jones "treated
20 him badly" and was "rude and disrespectful." Ms. Trumbell reported this incident
21 to Ms. DeMers, and Ms. Weisenburg learned of this complaint as well.

22 On May 8, 2018, Ms. DeMers learned about an incident that took place on
23 April 24, 2018. Ashley Spies, an ED RN, emailed Ms. Suarez about an incident in
24 which a patient and her husband were upset after Mr. Jones accused the patient of
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27 ³ A "Caught in the Act of Caring Card" is a feedback card available throughout the
28 ED that patients, staff, visitors, etc. can fill out.

1 being drug seeking. Ms. Weisenburg learned of this incident no later than May 25,
2 2018.

3 On May 18, 2018, Ms. Koehn texted Ms. Suarez regarding an incident in
4 which Ms. Koehn advised her student nurse to not translate for Mr. Jones during a
5 procedure and he was furious at her. Ms. Suarez texted Mr. Jones to let him know
6 that Ms. Koehn was correct pursuant to Defendant's policy. Mr. Jones confronted
7 Ms. Koehn, asking to see the text messages she had sent about the incident and
8 telling her that she "opened a can of worms." Ms. DeMers and Ms. Suarez viewed
9 Mr. Jones's confrontation as potentially inappropriate attempts to intimidate Ms.
10 Koehn for raising concerns about him.

11 Defendant's management received a report that, on or about May 18, 2018,
12 Mr. Jones had muttered under his breath to a Spanish-speaking mother of a patient
13 something like, "Why don't you know English? You are in America." Ms.
14 Weisenburg learned of this incident no later than May 25, 2018.

15 On June 7, 2018, Mr. Jones met with Ms. DeMers and Dr. Tran, the Medical
16 Director of the ED. Ms. Demers and Dr. Tran spoke with Plaintiff about his
17 interactions with patients, and counseled him that while he may have strong
18 feelings about patients he perceives as drug seeking, the ED may not be the time to
19 lecture or educate the patient about it. They also instructed that Mr. Jones should
20 not be discussing his personal life with patients.

21 They discussed Mr. Jones's hearing loss and he asked that he be able to sit in
22 the "MD" spot in the main ED, so he could hear the nurses better. Dr. Tran did not
23 have an issue with his request and indicated there should not be a problem with
24 that change.

25 Around this same time, a meeting regarding Flex Care was held. It was
26 decided that the ED would experiment with having the Advance Care Practitioner
27
28

1 (APC)⁴ stationed in the Triage/Flex Care area between 12:00 noon to 12:00 a.m.
2 The goal was to have the APC stay in this area unless the ED physician requested
3 help in the main ER.

4 After the June 7, 2018 meeting, Defendant continued to receive additional
5 complaints about Mr. Jones's conduct. No later than June 12, 2018, Ms. Suarez
6 received a report that, on or June 3, 2018, Mr. Jones had pushed back on seeing a
7 patient in Flex Care, and then in reference to Dr. Simmons, a female ED physician,
8 said something about the physician "sucking on her mother's tit." Ms. Koehn made
9 a report about this incident. Katie Hammer, ED Health Unit Coordinator, emailed
10 Ms. Suarez and Ms. DeMers about the incident. Ms. DeMers told Ms. Weisenburg
11 about Plaintiff's comment.

12 Ms. DeMers emailed Mr. Jones notifying him that she had received reports
13 regarding his interaction with the nurses and patients. Plaintiff replied that he was
14 on vacation but was "unaware of any adverse interactions with nursing or
15 patients." The Jones returned from vacation and on July 1, 2018, when neither one
16 was scheduled to work, they went into the ED and "thanked" those co-workers
17 who they believed did not report Mr. Jones about his comment about Dr. Simmons.
18 Mr. Jones said that "I know Cortney has it in for me." Ms. Koehn reported the
19 Jones's visit to the ED the next day to Ms. Suarez, who in turn reported it to Ms.
20 DeMers and Ms. Weisenburg. Ms. Koehn reported that she felt threatened by Mr.
21 Jones and she was "scared to work with him." Ms. Suarez, Ms. DeMers, and Ms.
22 Weisenburg viewed Mr. Jones' conduct as potential retaliation or intimidation of
23 Ms. Koehn.

24 As a result of this incident, Ms. DeMers and Ms. Weisenburg met with Mr.
25 Jones on July 5, 2018. By July 5, 2018, Defendant had received at least a dozen co-
26 worker and patient complaints about Mr. Jones's conduct. With respect to Mr.

27
28 ⁴ Mr. Jones was considered an APC.

1 Jones's comment about Dr. Simmons, he explained that he said "I was saving
2 people's lives when she was nursing on her mother's breast" but agreed that his
3 statement was inappropriate. Mr. Jones also mentioned that the noise from the
4 printers and copiers in the main ED "made his head want to explode" because of
5 his hearing loss. Ms. Weisenburg and Ms. DeMers discussed with Mr. Jones that
6 he was supposed to be sitting in the Flex Care area as part of his responsibilities
7 and this area was away from the printers and copiers. Ms. DeMers' notes reflect
8 that Mr. Jones indicated that the Flex Care arrangement was going better with less
9 noise exposure and "works beautifully."

10 A follow-up meeting was set for July 10, 2018, which Mr. Jones missed. In
11 the meantime, Ms. Suarez informed Ms. DeMers and Ms. Weisenburg that a
12 number of RNs came by her office concerned about postings that Plaintiffs put on
13 their lockers, including statements such as "prayers" for "enemies," "Father
14 Forgive Them" to "defend us in battle" and "protection" against "wickedness and
15 snares of the devil."

16 On July 20, 2018, Ms. Weisenburg and Ms. DeMers met with Mr. Jones and
17 issued him a Notice of Corrective Action. The July Corrective Action stated, in
18 part:

19 This verbal warning shall serve to confirm disciplinary action
20 regarding professional conduct and courteous communication.

21 . . .

22 Corrective Action/Replacement Behavior: We expect you to conduct
23 yourself in a professional and courteous communication at all times.
24 Be professional and respectful of others in all communications,
25 whether face-to-face, by phone, written, or electronic. These changes
26 must be immediate and sustained. Should you fail to make necessary
27 improvements, you will be subject to further disciplinary action up to
28 and including termination.

27 Penny Mayo, an RN in the ED, reported to Defendant that on or about
28 August 4, 2018, Mr. Jones was judgmental toward a patient who was intoxicated.

1 Mr. Jones refused to give her any pain medication before reducing her ankle
2 fracture because she was intoxicated.

3 On September 10, 2018, Ms. Weisenburg and Ms. DeMers met with Mr.
4 Jones to find out what happened on August 4, 2018. He explained that he had
5 difficulty treating patients he perceived as under the influence due to losing his
6 parents and a sibling through separate drunk driving accidents.

7 Ms. Weisenburg then spoke with Penny Mayo on September 26, 2018 about
8 the incident. Consequently, Ms. Weisenburg and Ms. DeMers decided that Mr.
9 Jones should be disciplined for his conduct.

10 On October 2, 2018, Ms. Weisenburg and Ms. Demers met with Mr. Jones
11 and issued him a "Final Written Warning." It stated, in part:

12 Corrective Action/Replacement Behavior: We expect you to conduct
13 yourself in a professional manner which includes professional and
14 courteous communication at all times. Be professional and respectful
15 of others in all communications, whether face-to-face, by phone,
16 written, or electronic. These changes must be immediate and
17 sustained. Should you fail to make necessary improvements, your
18 employment with Samaritan Healthcare will be terminated.

19 On October 5, 2018, Mr. Jones filed a Complaint with the Equal
20 Employment Opportunity Commission and the Washington State Human Rights
21 Commission. He indicated he was being discriminated against on the basis of sex,
22 age, disability, retaliation, and was experiencing a hostile work environment.
23 Specifically, he indicated he was being discriminated against based on his hearing
24 loss. He stated that he had requested to be seated away from his regular desk which
25 is adjacent to four copy machines that are very noisy, but his employer only
26 sometimes accommodated his request.

27 According to Plaintiffs, the harassment claim was based on five topics: (1)
28 colleagues telling Mr. Jones to "turn it up," (2) "check your batteries," (3) "never
mind" (with eye rolling), (4) "lip-syncing" and (5) being "offended" when he

1 asked to see their faces to read lips. Plaintiffs also assert that ED nurses Cortney
2 Koehn and Jeni Seitz would press the “call” button in unoccupied patient rooms to
3 initiate the 150 decibel alarm to ring a couple feet from Mr. Jones’s good left ear.
4 The nurses would tell him the alarm was in an empty room, and then refused to
5 turn off the alarms. He would have to turn the alarm off himself, and the nurses
6 would laugh. He maintains that the nurses would trigger alarms, lip synch when
7 talking to him, purposely talk in low voices, but also yell at him. He maintains that
8 this behavior increased as he was getting written up.

9 On April 13, 2019, Mr. Jones emailed an investigator at the EEOC, stating
10 that “there has been a few significant changes. My work had improved
11 significantly after consulting an attorney. All complaints, harassments, had all but
12 ceased and I was able to reestablish a good working relationship with the ED staff.
13 I was prepared to cancel the EEOC proceedings.”

14 On March 1, 2019, Jeni Seitz reported to Ms. Suarez that she had a number
15 of concerns regarding Mr. Jones that occurred on February 24, 2019. She reported
16 that Mr. Jones cared for four patients and was “very rude to each causing each
17 patient to either cry, leave [against medical advice] and cuss and scream at rest of
18 staff.” She relayed an incident where Mr. Jones was rude to his wife, Ms. Jones.
19 She added that she felt the ED was a hostile work environment and staff walked on
20 eggshells around the Jones.

21 Ms. Suarez called the patients that Ms. Seitz identified in her report. One
22 patient said that Mr. Jones was “rude from the beginning” and was “not
23 compassionate.” Another caregiver said that Mr. Jones showed no compassion
24 toward her father, who was a patient. Ms. Suarez reported her conversations to Ms.
25 Weisenburg by March 6, 2019.

26 On March 14, 2019, Ms. Suarez sent an email to Becky DeMers and Julie
27 Weinburg about a report by a staff member who wanted to remain anonymous. The
28 staff member stated that on March 10, 2019, Mr. Jones grabbed her ponytail and

1 said, “in grade school when little boys would pull little girls’ ponytails it means
2 they like them, what do you think it means now?” She reported a second incident
3 where she had made a comment about a particular nurse being a black cloud
4 because it is always busy when she is triage RN, and Mr. Jones stated in response,
5 “Or somebody is saying there is a really hot nurse out here wanna come and see
6 her, she’s been doing a really good job in triage.” Finally, she reported that Mr.
7 Jones told her that “he slept naked” and made statements about another staff
8 member that “she has a really nice mouth.”

9 On March 18, 2019, Ms. Weinsenburg was forwarded a Facebook message
10 from Defendant’s internal Facebook page that stated:

11 We are horrified at the behavior of an Er doctor. Dr. Russell [Mr.
12 Jones] has no tact and says inappropriate things. We have had him on
13 a few occasions and he is disgusting. My husband was there tonight
14 for some bleeding. He told him he was going to peek at his bottom.
15 No warning at all that he was going to stick his fingers up there to
16 check. It was horribly painful and we were shocked as he could see
17 the discomfort and told my husband to lift his leg over. He then
18 proceeded to tell us about his experience back east and how some of
19 the guys would move closer to him. My husband actually told him no
20 when he realized what he was doing and he didn't stop.

21 My husband actually told him he was done and wanted to leave and
22 he ignored him and just kept telling his disgusting stories!

23 My husband actually told him you just fucking raped me and the dr
24 didn't say anything and walked out.

25 On March 19, 2019, Ms. Trumbull and Kurt Kuykendall, Defendant’s
26 Director of Quality and Risk Management, called the patient’s spouse who had
27 sent the Facebook message. She confirmed her account of the incident and also
28 relayed that her 17-year-old son had been seen by Mr. Jones in January, and during
the visit Mr. Jones told stories to her son about a nurse that was really “hot,” but
that he was married so he had to be careful. Later that day, Ms. Weisenburg, Ms.

1 Trumbull and Mr. Kuykendall also spoke with the patient.

2 Mr. Jones was put on administrative leave on March 20, 2019. In
3 investigating the claim, Defendant noted that Mr. Jones had charted 14 of his 15
4 patient encounters that evening, but he did not chart for the patient who
5 complained of the incident above.

6 On March 28, 2019, Ms. Weisenburg and Ms. DeMers met with Mr. Jones
7 regarding the incident. He generally denied the allegations.

8 On April 5, 2019, Ms. Weisenburg terminated Mr. Jones' employment via
9 letter stating: "in light of the severity of the incident, and your prior disciplinary
10 infractions and performance deficiencies, your employment with [Defendant] is
11 terminated effective today, April 5th."

12 On April 23, 2019, Ms. Weisenburg submitted a Healthcare Provider
13 Complaint Form to the Washington Department of Health, regarding the incident
14 that occurred on March 19, 2019 because of the sexual nature of the encounter.

15 On August 6, 2019, Mr. Jones filled out an Equal Employment Opportunity
16 Questionnaire against Defendant. In this Form, Plaintiff identified the
17 discriminatory action as his "[t]ermination in retaliation for filing a pervious EEOC
18 Complaint." The formal EEOC Charge of Discrimination, which was signed by
19 Plaintiff on August 30, 2019, states that the latest dates that discrimination took
20 place was April 5, 2019. He indicated that he requested to be seated away from the
21 four noisy copiers, and that his employer agreed with the request "indicating there
22 was no 'required' seating arrangements."

23 Plaintiffs assert the timing of his termination coincides with him signing a
24 contract with Sound Physicians. They believe that Defendant wanted to terminate
25 Mr. Jones prior to April 15, 2019, because after that date, they would not have the
26 authority to do so since he would be working for Sound Physicians.

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28 //

Defendant's Motion for Summary Judgment

Defendant makes the following arguments in support of its Motion for Summary Judgment: (1) Mr. Jones failed to exhaust any post-October 2018 Title VII claims and claims based on Defendant's report to the State; (2) the filing of the report to the Washington Department of Health is speech activity immune from suit under the *Noerr-Pennington* doctrine; (3) Plaintiffs' disparate treatment claim fails because they cannot show that Mr. Jones was performing his job satisfactorily and cannot establish a prima facie case of causation; (4) Plaintiffs' retaliation claims fail because of the timing of the charge, the fact that his termination was based on subsequent conduct, reports, and complaints, and the fact that he cannot show by "specific and substantial" evidence that Defendant did not "honestly believe" the reasons for terminating him or that patient complaints, prior disciplinary actions and performance deficiencies were pretext to retaliate for his prior EEOC charge that was filed six months later; (5) Plaintiffs' failure to accommodate claim fails because they cannot show Mr. Jones was qualified for his ARNP role because he was not performing his job anywhere near "satisfactorily," regardless of his hearing loss, given the many complaints against him and his disciplinary history and regardless, Defendant granted his accommodation requests. Defendant also argues that Plaintiffs cannot show that Mr. Jones's request for accommodation was a "but for" cause of his termination; and (6) Plaintiffs did not exhaust any alleged age and gender-based harassment claim; the record suggests that Plaintiffs' reasons that their co-workers did not like Mr. Jones are non-protected reasons; any alleged harassment that presumably was but-for his hearing loss was not severe or pervasive; and as soon as Defendant was aware of Mr. Jones's complaint, it took remedial action and the harassment discontinued.

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Analysis

1. Failure to Exhaust

Title VII requires claimants to file a charge of discrimination with the EEOC prior to filing a lawsuit against the employer. 42 U.S.C. § 2000e-5(e). “Title VII’s charge-filing requirement is a processing rule, albeit a mandatory one, not a jurisdictional prescription delineating the adjudicatory authority of the courts.” *Fort Bend Cty, Texas v. Davis*, __ U.S. __, 139 S.Ct. 1843, 1851 (2019).

The scope of the plaintiff’s court action depends on the scope of the EEOC charge and investigation. *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994); *Sosa v. Hiraoka*, 920 F.2d 1451, 1456 (9th Cir. 1990). The specific claims made in district court ordinarily must be presented to the EEOC. *Albano v. Schering–Plough Corp.*, 912 F.2d 384, 385 (9th Cir. 1990). However, any charges of discrimination that are (1) “like or reasonably related to” the allegations made before the EEOC, and/or (2) charges that are within the scope of an EEOC investigation that reasonably could be expected to grow out of the allegations may be considered by the district court. *Sosa*, 920 F.2d at 1456. The reasoning behind this is that if closely related incidents occur after a charge has been filed, additional investigative and conciliative efforts would be redundant. *Brown v. Puget Sound Elec. Apprenticeship & Training Trust*, 732 F.2d 726, 729-30 (9th Cir. 1984). On the other hand, “[w]here claims are not so closely related that agency action would be redundant, the EEOC must be afforded an opportunity to consider disputes before federal suits are initiated. Bypassing the administrative process under such circumstances frustrates the policy of encouraging informal conciliation and fostering voluntary compliance with Title VII.” *Id.*

In analyzing the EEOC charge, the Court must construe the charge liberally. *Sosa*, 920 F.2d at 1456. In determining whether a claim is like or reasonably related to the claim presented to the EEOC the Court considers whether the claim was investigated by the EEOC, and whether such an investigation could not have

1 been reasonably expected to grow out of the plaintiff's charges. *Id.*; *see also Leong*
2 *v. Potter*, 347 F.3d 1117, 1121 (9th Cir. 2003). Also, the Court needs to consider
3 whether Mr. Jones's charge provided adequate notice of his claims or whether a
4 voluntary settlement of his claim might be possible through reasonable
5 accommodation. *Sosa*, 920 F.2d at 1456.

6 Here, Plaintiffs failed to exhaust Defendant's filing of the April 23, 2019
7 report with the Washington Department of Health. Mr. Jones's August 2019 EEOC
8 claim indicated that the latest dates that discrimination took place was April 5,
9 2019. The August 2019 claim indicated that he was terminated in retaliation for
10 filing an EEOC claim, as well as being discriminated against because of his age,
11 disability, and engagement in protective activity. EEOC would not have know to
12 investigate the filing of the report. Moreover, Mr. Jones's August 2019 EEOC
13 claim fails to indicate that he was terminated because of his sex. Thus, to the extent
14 that Plaintiffs are now making such a claim, they failed to properly exhaust it and it
15 is not properly before the Court.

16 2. *Noerr-Pennington* doctrine

17 Because the Court finds that Mr. Jones failed to exhaust any claim based on
18 the filing of the report with the Washington Department of Health, the Court need
19 not address whether the *Noerr-Pennington* doctrine provides immunity for the
20 filing of the report.

21 3. Disparate Treatment Claim

22 Plaintiffs are bringing claims for disparate treatment under both Title VII
23 and the Age Discrimination in Employment Act (ADEA).

24 A. Title VII

25 Under Title VII, an employer may not "discriminate against an individual
26 with respect to his . . . terms, conditions, or privileges of employment" because of
27 his sex. 42 U.S.C. § 2000e-2(a).

1 The legal framework to analyze a motion for summary judgment on a Title
2 VII claim is set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
3 Under this framework, to survive a motion for summary judgment on a disparate
4 treatment claim under Title VII, Plaintiffs must first establish a prima facie case of
5 discrimination. *Id.* at 802. To do so, Plaintiffs must offer proof that: (1) Mr. Jones
6 belongs to a class of persons protected by Title VII; (2) Mr. Jones performed his
7 job satisfactorily; (3) Mr. Jones suffered an adverse employment action; and (4)
8 Defendant treated Mr. Jones differently than a similarly situated employee who
9 does not belong to the same protected class as he does. *Cornwell v Electra Cent.*
10 *Credit Union*, 439 F.3d 1018, 1028 (9th Cir. 2006).

11 If Plaintiffs establish a prima facie case of disparate treatment, the burden of
12 production (but not persuasion) then shifts to Defendant to articulate some
13 legitimate, nondiscriminatory reason for the challenged action. *Id.* at 802. If
14 Defendant does so, Plaintiffs must show that the articulated reason is pretextual
15 “either directly by persuading the court that a discriminatory reason more likely
16 motivated [Defendant] or indirectly by showing that [Defendant’s] proffered
17 explanation is unworthy of credence.” *Chuang v. Univ. of Calif. Davis*, 225 F.3d
18 1115, 1123 (9th Cir. 2000) (quotation omitted). Although a plaintiff may rely on
19 circumstantial evidence to show pretext, such evidence must be both specific and
20 substantial. *Villiarimo*, 281 F.3d at 1062.

21 “In the context of employment discrimination law under Title VII, summary
22 judgment is not appropriate if, based on the evidence in the record, a reasonable
23 jury could conclude by a preponderance of the evidence that the defendant
24 undertook the challenged employment action because of the plaintiff’s [protected
25 status].” *Cornwell*, 439 F.3d at 1028.

26 Here, regardless of whether Mr. Jones was performing his job satisfactorily,
27 Defendant has rebutted any presumption and has amply shown that it terminated
28 Mr. Jones for legitimate, nondiscriminatory reasons and Plaintiffs have failed to

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1 show that these reasons are pretext for gender discrimination. The Court finds that
2 a reasonable jury would not conclude by a preponderance of the evidence that Mr.
3 Jones's sex was a motivating factor in Defendant's decision to terminate him. As
4 such, summary judgment on Plaintiffs' Title VII claim is appropriate.

5 **B. ADEA**

6 The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et*
7 *seq.*, protects workers aged forty or older from employment discrimination on the
8 basis of their age. The ADEA provides, in relevant part, that "[i]t shall be unlawful
9 for an employer ... to fail or refuse to hire or to discharge any individual or
10 otherwise discriminate against any individual with respect to his compensation,
11 terms, conditions, or privileges of employment, because of such individual's age."
12 29 U.S.C. § 623(a)(1) (emphasis added). "There is no disparate treatment under the
13 ADEA when the factor motivating the employer is some feature other than the
14 employee's age." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993).

15 To establish a disparate-treatment claim under the ADEA, a plaintiff must
16 prove that age was the "but-for" cause of the employer's adverse decision. *Gross v.*
17 *FBL Financial Serv., Inc.*, 557 U.S. 167, 177 (2009). Under the ADEA, then, the
18 burden does not shift to the employer to show that it would have taken the action
19 regardless of age, even when a plaintiff has produced some evidence that age was
20 one motivating factor in that decision. *Id.*

21 Here, a reasonable jury would not conclude that Defendant discharged
22 Plaintiff because of his age. Notably, Defendant was hired when he was 57 years
23 old. If Defendant had some animus toward older workers, it never would have
24 hired Mr. Jones in the first place. There is nothing in the record that suggest that
25 Mr. Jones's age had anything to do with any disciplinary action or the decision to
26 terminate him.

27 **4. Americans With Disabilities Act (ADA) Claim**

28 The Americans With Disabilities Act (ADA) provides that no employer

1 “shall discriminate against a qualified individual on the basis of disability in regard
2 to ... discharge of employees ... and other terms, conditions, and privileges of
3 employment.” 42 U.S.C.A. § 12112(a). Thus, under the ADA, an employer may
4 not terminate an employee because of their physical or mental impairment.
5 Additionally, an employer engages in unlawful discrimination under the ADA by
6 “not making reasonable accommodations to the known physical or mental
7 limitations of an otherwise qualified individual with a disability[.]” 42 U.S.C. §
8 12112(b)(5)(A).

9 To establish an ADA discrimination claim, a plaintiff must show that (1) he
10 is disabled; (2) he is a qualified individual, meaning he can perform the essential
11 functions of her job; and (3) the defendant (a) failed to provide a requested
12 reasonable accommodation, (b) failed to engage in an interactive process where a
13 reasonable accommodation would have been possible, or (c) terminated the
14 plaintiff because of his disability. *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481
15 (9th Cir. 1996); *Sanders v. Arneson Prods., Inc.*, 91 F.3d 1351, 1353 (9th Cir.
16 1996); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1246 (9th Cir. 1999);
17 *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1090 (9th Cir. 2002).

18 Discrimination claims under the ADA are subject to the burden-shifting
19 *McDonnell Douglas* framework. *Curley v. City of North Las Vegas*, 772 F.3d 629,
20 632 (9th Cir. 2014). Under this framework, an employee challenging an adverse
21 employment action has the initial burden of establishing a prima facie case of
22 discrimination. *Id.* The burden then shifts to the employer to provide a legitimate,
23 nondiscriminatory, or nonretaliatory reason for the adverse employment action. *Id.*
24 If the employer does so, then the burden shifts back to the employee to prove the
25 reason given by the employer was pretextual. *Id.*

26 Here, Defendant has rebutted any presumption and has amply shown that it
27 terminated Mr. Jones for legitimate, nondiscriminatory reasons and Plaintiffs have
28 failed to show that these reasons are pretext for disability discrimination. *See id.*

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1 (declining to decide whether the plaintiff can establish a prima facie case of
2 discrimination because, even if he could, he failed to raise a genuine issue of
3 material fact as to whether the employer's reasons for terminating him were
4 pretextual).

5 Also, Plaintiffs have not shown there are questions of material fact regarding
6 whether Defendant failed to provide a requested reasonable accommodation.
7 Rather, the record indicates that Mr. Jones requested and received appropriate
8 accommodations. A reasonable jury would not find that Defendant discriminated
9 against Mr. Jones by failing to provide a reasonable accommodation. As such,
10 summary judgment on Plaintiffs' ADA claims are appropriate.

11 5. Retaliation Claims

12 Title VII, the ADEA, and the ADA all prohibit an employer from retaliating
13 against an employee for engaging in protected activity. *See* 42 U.S.C. § 2000e-3(a)
14 (Title VII); 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 12203(a) (ADA). Such
15 retaliation claims proceed under the *McDonnell Douglas* burden-shifting
16 framework. *See Pardi v. Kaiser Found. Hosp.*, 389 F.3d 840, 849 (9th Cir. 2004)
17 (ADA retaliation claim); *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997)
18 (Title VII retaliation claim); *see also Merrick v. Farmers Ins.*, 892 F.2d 1434, 1441
19 (9th Cir. 1990) (applying Title VII discrimination case law to ADEA retaliation
20 case).

21 To establish a prima facie case, the plaintiff must show that (1) he engaged
22 in a protected activity; (2) he suffered an adverse employment decision; and (3)
23 there was a causal link between the two. *Pardi*, 389 F.3d at 849; *Hashimoto*, 118
24 F.3d at 679; *see also O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756,
25 763 (9th Cir.1996) (ADEA retaliation claim).

26 The causation element may be inferred based on the proximity in time
27 between the protected action and the retaliatory act; however, if the proximity in
28 time is the only evidence to support plaintiff's retaliatory act, it must be "very

1 close” in time. *See Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987).

2 Here, Plaintiffs have not established a prima facie case of retaliation based
3 on the filing of an EEOC claim. Notably, Plaintiff filed his EEOC charge three
4 days after receiving a final warning. Additionally, he was not terminated until six
5 months after he filed his EEOC claim. Plaintiffs have failed to present any
6 evidence that Defendant terminated Mr. Jones because he requested
7 accommodations for his hearing loss. He requested accommodations as early as
8 June 2018, and he was not terminated until April 2019. Additionally, Plaintiffs
9 have failed to show that Defendant’s reasons for terminating Mr. Jones were
10 pretext for discriminating against him for filing the EEOC charge. As such,
11 summary judgment on Plaintiffs’ retaliations claims is appropriate.

12 **6. Harassment claims**

13 While the Ninth Circuit generally treats Title VII and ADEA harassment or
14 hostile work environment claims under the framework as set forth in the U.S.
15 Supreme Court decisions of *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 (1998),
16 and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), it has yet to rule
17 whether a hostile work environment is cognizable under the ADA. *See Meirhofer*
18 *v. Smith’s Food and Drug Centers, Inc.*, 2011 WL 642664 (9th Cir. 2011).

19 To the extent Plaintiffs are bringing a harassment or hostile work
20 environment claim under Title VII or the ADEA, summary judgment is appropriate
21 on that claim. Plaintiffs have not shown that Mr. Jones was subjected to insults,
22 jokes or verbal conduct that were based on his gender or age. Plaintiffs have
23 identified five categories of harassing behavior they believe support their
24 harassment or hostile work environment claims based on Mr. Jones’s disability.
25 Assuming that hostile work environment claims are cognizable under the ADA,
26 these instances do not rise to the level of a “discriminatory hostile or abusive
27 environment.” *See id.* at *1 (“At most, derogatory nickname and occasional
28 insulting comments constituted ‘simple teasing’ and ‘isolated incidents’ and were

1 not sufficiently severe or pervasive to alter the terms and conditions of his
2 employment and create an abusive work environment,” citing *Faragher*, 524 U.S.
3 at 788). As such, summary judgment on Plaintiffs’ harassment/hostile work
4 environment claims is appropriate.

5 Accordingly, **IT IS HEREBY ORDERED:**

6 1. Defendant’s Motion for Summary Judgment, ECF No. 107, is
7 **GRANTED.**

8 2. The District Court Executive is directed to enter judgment in favor of
9 Defendant and against Plaintiffs.

10 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
11 file this Order, provide copies to counsel, and **close** the file.

12 **DATED** this 15th day of June 2021.



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A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

18 Stanley A. Bastian
19 Chief United States District Judge
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